

June 12, 2018

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON**

**DIVISION II**

S.T.,

Appellant,

v.

STATE OF WASHINGTON, DEPARTMENT  
OF SOCIAL & HEALTH SERVICES,  
DIVISION OF VOCATIONAL  
REHABILITATION,

Respondent.

No. 50661-1-II

UNPUBLISHED OPINION

MAXA, C.J. – ST<sup>1</sup> applied to the Division of Vocational Rehabilitation (DVR) for vocational rehabilitation services because her post-traumatic stress disorder (PTSD) affected her ability to work. DVR determined that ST was eligible for services, but later closed her case when she refused to participate in mental health services. ST appeals an administrative law judge’s (ALJ) ruling affirming DVR’s decision to close her case and the superior court’s order affirming that ruling.

We hold that (1) the ALJ did not err in affirming DVR’s decision to close ST’s case, (2) DVR’s requirement that ST participate in mental health services in order to obtain vocational rehabilitation services did not violate any constitutional provisions, (3) the superior court did not err in denying ST’s motion to seal the entire court record and instead ordering the redaction of certain information, (4) ST was not entitled to appointed counsel on judicial review of an agency

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<sup>1</sup> A commissioner of this court previously ruled that ST would be identified by her initials.

determination, (5) ST is not entitled to recover any compensation from DVR, and (6) ST's other arguments are not material to this case.

Accordingly, we affirm the ALJ's ruling and the superior court's order affirming that ruling, affirm the superior court's order denying ST's motion to seal the court record, and reject ST's other arguments.

## FACTS

### *Application for DVR Services and Case Closure*

In May 2014, ST applied for vocational rehabilitation services from DVR, a division of the Department of Social and Health Services (DSHS). On her application, ST stated that she had a "psychiatric/emotional condition" identified as PTSD that affected her ability to work. Clerk's Papers (CP) at 15. At the time of the application, ST was receiving disability benefits because of her PTSD and was receiving treatment for that condition.

In 2013, ST had undergone a psychological evaluation and had been diagnosed with PTSD and cluster B personality disorder with borderline, hysterical, paranoid, narcissistic, and antisocial features. The evaluator stated that ST's primary barrier to employment was her serious character pathology.

ST met with a vocation rehabilitation counselor to discuss what services DVR could provide that would help ST overcome barriers to employment. ST stated that she was interested in being self-employed and starting an online reservation company. ST's counselor referred her to a consulting company, Avita & Associates, for a feasibility study on ST's ability to be successfully self-employed.

Avita identified several concerns regarding ST's ability to execute her business plan, including her psychological diagnoses and her ability to manage stressful business situations.

Avita expressed concerns about whether ST was stable enough to be self-employed without participation in ongoing mental health treatment. Avita requested documentation that ST was participating in mental health treatment before continuing the feasibility study. The vocational counselor recommended that ST participate in behavioral therapy and stated that ST should explore her ability to perform self-employment work through a trial work experience.

ST rejected the recommendations of mental health treatment and trial work experience. ST's vocational counselor recommended an extended evaluation as an alternative, and ST agreed to participate.

ST and a new vocational counselor both signed an extended evaluation agreement, which required ST to participate in "physical and mental restoration" services. CP at 20. The counselor and ST discussed obtaining a new psychological evaluation, and the counselor told ST that the next step in her assessment would be to participate in that psychological evaluation. ST responded that she would not comply with any recommendations for mental health treatment because she did not believe in mental health care.

DVR informed ST that it intended to close her case for failure to participate in services. ST responded that she refused to participate in coerced psychological treatment. As a result, DVR issued a letter closing ST's case service record.

*Appeal to ALJ and Superior Court*

ST appealed DVR's decision to close her case. After a hearing, an ALJ entered findings of fact and conclusions of law. The ALJ concluded that DVR properly required that ST comply with its treatment recommendations and participate in mental restoration services to complete a feasibility assessment. The ALJ stated that ST had the right to refuse to participate in mental

health treatment, but as a result of her refusal DVR could properly close her case. Therefore, the ALJ affirmed DVR's decision to close ST's case service record.

ST appealed the ALJ's decision to superior court. In superior court, ST filed a motion to seal the case, keep her name, image, and video recording out of the record and to close the courtroom. ST argued that it was necessary to seal her case to protect her personal safety because she was the victim of a stalker. ST also argued that sealing the case was required because the record contained privileged information from psychological evaluations which could be used against her in the future. After analyzing the five *Ishikawa*<sup>2</sup> factors, the superior court denied ST's motion to seal the entire court record but ordered the clerk to seal and redact certain documents as a less restrictive alternative.

ST also requested that the superior court appoint counsel to represent her because she was indigent. There is no indication in the record that the superior court addressed this request.

The superior court heard oral argument on the petition for review of the administrative decision. The superior court ruled that DVR had not violated its statutory authority and that substantial evidence supported DVR's decision. Therefore, the court affirmed the ALJ's ruling.

ST appealed the superior court's decision directly to the Supreme Court. The Supreme Court transferred the case to this court.

## ANALYSIS

### A. DVR'S CLOSURE DECISION

ST argues that the ALJ and the superior court erred in affirming DVR's decision to close her case. She claims that (1) DVR erroneously applied the law in closing her case when she

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<sup>2</sup> *Seattle Times Co. v. Ishikawa*, 97 Wn.2d 30, 37-39, 640 P.2d 716 (1982).

refused to participate in mental health services; (2) the ALJ improperly disregarded her evidence; and (3) DVR's requirement that she participate in mental health services to obtain vocational rehabilitation services is unconstitutional. We disagree.

1. Legal Principles

Our review of an agency decision is governed by the Administrative Procedures Act (APA). RCW 34.05.570(3). In reviewing a claim under the APA, we sit in the same position as the superior court and review the ALJ's decision. *Karanjah v. DSHS*, 199 Wn. App. 903, 914, 401 P.3d 381 (2017).

Under the APA, we may grant relief from an agency order based on one of nine reasons listed in RCW 34.05.570(3), including that the order is (1) based on a violation of constitutional provisions, (2) based on an erroneous interpretation or application of the law, (3) unsupported by substantial evidence, or (4) arbitrary and capricious. RCW 34.05.570(3)(a), (d), (e), (i). The party challenging the ALJ's decision has the burden of demonstrating the invalidity of that decision. RCW 34.05.570(1)(a).

We review an agency's application of the law and constitutional questions de novo. *Cornelius v. Dep't of Ecology*, 182 Wn.2d 574, 585, 344 P.3d 199 (2015).

2. Application of the Law

ST argues that DVR erroneously applied the law in closing her case when she refused to participate in mental health services. We disagree.

DVR is an agency which provides vocational rehabilitation services. RCW 74.29.020(2). To be eligible for DVR services, a client must meet three criteria: (1) the client has a physical, mental, or sensory impairment that substantially impedes employment; (2) the client requires DVR services to get or keep a job; and (3) the client is capable of working as a result of

receiving DVR services. WAC 388-891-1000. DVR determines if a client is eligible through an assessment process, which includes examining education and medical records. WAC 388-891-1005(1).

If a client refuses to provide records or participate in necessary services to determine if a client is eligible, DVR closes the client's case. WAC 388-891-1005(1)(d). DVR also has general authority to close a client's case if the client refuses to participate in required or agreed upon conditions or services. WAC 388-891-1300(7).

Here, ST argues that DVR was required to perform a trial work experience before closing her case. However, trial work experience is only one assessment option. WAC 388-891-1030. An extended evaluation is an alternative process of determining client eligibility. WAC 388-891-1040. ST opted not to do a trial work experience and agreed to an extended evaluation instead.

ST also argues that applicable law did not allow DVR to close her case when she refused to participate in mental health services, claiming that "[n]o WACs or RCWs allow DVR to require any mental health treatment." Br. of Appellant at 20. But WAC 388-891-1300(7) expressly states that DVR will close the case if "[y]ou refuse to cooperate in required or agreed upon conditions or services." DVR required ST to participate in mental health services as part of the assessment process, and ST refused. Therefore, WAC 388-891-1300(7) applies and allowed DVR to close ST's case.

We hold that DVR did not erroneously apply the law in closing ST's case when she refused to participate in mental health services.

### 3. Substantial Evidence

ST argues that DSHS' decision was invalid because the ALJ did not consider her evidence. She also appears to argue that the evidence did not support the ALJ's decision. We disagree.

We review an agency's findings of fact for substantial evidence. *Karanjah*, 199 Wn. App. at 916. Substantial evidence is that which is sufficient to persuade a fair-minded person that the finding is true. *Id.* We do not weigh witness credibility. *Id.*

Here, DVR presented evidence that ST agreed to an extended evaluation, which included mental health treatment as a required component. DVR also presented evidence that mental health treatment was a necessary service to assess ST's capability to work. In addition, DVR showed that ST refused to participate in mental health services. This evidence supports the conclusion that ST refused to participate in necessary services.

Regarding ST's argument that the ALJ did not consider her evidence, ST does not argue and the record does not suggest that the ALJ excluded her evidence. Instead, ST seems to take issue with the ALJ's evaluation of the weight and credibility of different evidence. But we do not weigh evidence or make credibility determinations. *Karanjah*, 199 Wn. App. at 916.

We hold that substantial evidence supports the ALJ's decision and that the ALJ did not fail to consider ST's evidence.

### 4. Constitutional Challenges

ST argues that DVR's requirement that she participate in mental health services to obtain vocational rehabilitation services violates various constitutional provisions. We disagree.

a. First Amendment

ST argues that requiring her to participate in mental health treatment violates her First Amendment rights because she does not believe in participating in such treatment. ST also claims that DVR violated her freedom of religion because any deeply held belief – such as her belief that a person should not be required to participate in mental health treatment – is equivalent to a religious belief.

The First Amendment protects the free exercise of religion and religious beliefs by invalidating government actions that force a party to choose between their religious belief and an otherwise available public benefit. *Trinity Lutheran Church of Columbia, Inc. v. Comer*, \_\_\_ U.S. \_\_\_, 137 S. Ct. 2012, 2019, 2021, 198 L. Ed. 2d 551 (2017).

Here, the public benefit in question is available for *eligible* participants with physical and mental health conditions. Although DVR initially determined that ST was eligible for DVR services, ST's refusal to participate in mental health services prevented DVR from determining if ST could benefit from vocational rehabilitation services. Therefore, we hold that DVR's requirement that ST participate in mental health treatment to complete her extended evaluation did not trigger ST's First Amendment rights because the record is not sufficient to show that ST would otherwise have qualified for the public benefit.

b. Second Amendment

ST argues that requiring her to participate in mental health treatment violates her Second Amendment right to keep and bear arms. This argument is based on her claim that people with mental illness can have their gun rights restricted and that mental health records can be released as part of the background check process, which could prevent the purchase of a gun. However, we have not located any authority for the proposition that a requirement that an application for



vocational rehabilitation services consult with a mental health provider implicates the Second Amendment.

c. Fourth Amendment

ST argues that requiring her to participate in mental health treatment violates the Fourth Amendment because it constitutes an unreasonable search and seizure. However, we have not located any authority for the proposition that a consultation with a mental health provider constitutes a search.

ST also briefly argues that requiring her to participate in mental health treatment violates her right to privacy under the Fourth Amendment. But we have not located any authority for the proposition that a mental health consultation implicates the constitutional right to privacy.

d. Fifth Amendment

ST argues that requiring her to participate in mental health treatment violates her Fifth Amendment right against self-incrimination. She claims that information provided to mental health providers could be used against her in court. However, the Fifth Amendment states that a person shall not be compelled to be a witness against herself “in any *criminal* case.” (Emphasis added.) ST has not shown or even alleged that something she told a mental health provider might be used against her in a criminal case.

e. Eighth Amendment

ST argues that requiring her to participate in mental health treatment violates her Eighth Amendment right to be free from cruel and unusual punishment because she might be forced to receive psychiatric drugs or invasive therapy. However, we have not located any authority for the proposition that the Eighth Amendment’s cruel and unusual punishment clause applies to agency requirements for obtaining State benefits.

f. Due Process

ST argues that requiring her to participate in mental health treatment generally violates her due process rights. However, she argues only that people with mental health issues are in danger of being deprived of their liberty. She does not argue that she did not receive due process in this case.

B. MOTION TO SEAL ENTIRE SUPERIOR COURT RECORD

ST argues that the superior court erred in denying her motion to seal the entire superior court record and close the courtroom. We disagree.

1. Legal Principles

Article 1, section 10 of the Washington Constitution mandates that courts conduct judicial proceedings openly and without delay. Accordingly, court proceedings and court documents are presumptively open to the public and any exception is appropriate “only in the most unusual of circumstances.” *Hundtofte v. Encarnación*, 181 Wn.2d 1, 7, 330 P.3d 168 (2014) (plurality).

GR 15 (c)(2) allows a court to seal a court record if there are “compelling privacy and safety concerns that outweigh the public interest in access to the court record.” A court may seal court records only if it finds that sealing is warranted under both GR 15 and the five-factor test articulated in *Seattle Times Co. v. Ishikawa*, 97 Wn.2d 30, 37-39, 640 P.2d 716 (1982). *Hundtofte*, 181 Wn.2d at 7.

Under *Ishikawa*, a court must (1) consider the moving party’s interest in sealing the records, (2) allow any objections by those present when the motion was made, (3) consider whether the requested method of restricting access is the least restrictive means available and effective in protecting the moving party’s interest, (4) weigh the competing interests of the

moving party and the public interest and must consider alternative methods to protect the moving party's interest, and (5) enter an order that is no broader than necessary to protect the moving party's interest. *Hundtofte*, 181 Wn.2d at 8 (citing *Ishikawa*, 97 Wn.2d at 37-39). The party moving to seal a court record bears the burden of demonstrating a need to do so. *Hundtofte*, 181 Wn.2d at 7.

We review a superior court's decision on a motion to seal for an abuse of discretion. *Id.* at 6. A court abuses its discretion if its decision is manifestly unreasonable, exercised on untenable grounds, or exercised for untenable reasons. *Id.* An order to redact a court record is treated as an order to seal. *Id.*

## 2. *Ishikawa* Analysis

Here, the superior court articulated its consideration of each factor in a written order. Under the first factor, the court found that releasing certain information could potentially create a threat to ST's safety. But under the third factor, the court found that redaction of certain information was a less restrictive means of addressing that concern than sealing the entire court record. The court weighed ST's request against the public interest in disclosure under the fourth factor, and concluded under the fifth factor that redaction would accomplish the purpose of protecting ST's identifying information. Accordingly, the court ordered the clerk to file redacted copies of court records.

The superior court correctly applied the *Ishikawa* factors and properly exercised its discretion in determining that redaction of certain information protected ST while also recognizing the public's interest in open courts. We hold that the superior court did not abuse its discretion in denying ST's motion to seal the entire court record.

3. Privacy Act - RCW 9.73.030

ST states that she was not informed that her court appearances would be recorded and that she did not consent to being recorded. Therefore, she argues that the recording violated RCW 9.73.030. We disagree.

RCW 9.73.030 provides that it is illegal to record private telephone conversations or electronic communications with certain exceptions. By its plain terms, RCW 9.73.030 applies to intercepting *private* communication. To determine if a communication is private, a court considers the subject of the communication, location of participants, presence of other people, the role of the listening party, and the reasonable intent of the parties to communicate privately. *Marin v. King County*, 194 Wn. App. 795, 806, 378 P.3d 203, *review denied*, 186 Wn.2d 1028 (2016). There is no reasonable expectation of privacy for proceedings in open court. As noted above, article 1 section 10 generally requires court proceedings to be open to the public.

Accordingly, we hold that RCW 9.73.030 is inapplicable here.

4. Constitutional Arguments

ST argues that not sealing the court records is a violation of double jeopardy under the Sixth Amendment because she could be sued for defamation based on the contents of mental health records she thought were private. However, the Sixth Amendment expressly applies only in criminal cases. Therefore, double jeopardy is not an issue in a civil administrative appeal.

ST also claims in a heading in her brief that denying her motion to seal violated the First Amendment, Fourth Amendment right of privacy, Fifth and Fourteenth Amendment due process rights, Sixth Amendment right to present a defense, the Fourteenth Amendment right to equal protection, and article I, section 7 of the Washington Constitution. But she does not explain these claims or present any argument on them. Therefore, we decline to consider these

arguments. RAP 10.3(a)(6); *Norcon Builders, LLC v. GMP Homes VG, LLC*, 161 Wn. App. 474, 486, 254 P.3d 835 (2011).

Finally, ST argues that requiring her to appeal the ALJ's ruling within 30 days was unconstitutional because it did not give her enough time to seal the case before appealing. However, she provides no meaningful argument on this issue. Therefore, we decline to consider this argument. RAP 10.3(a)(6); *Norcon Builders*, 161 Wn. App. at 486.

#### 5. Ability to Withdraw Appeal

ST claims that the superior court did not permit her to withdraw her appeal once the court ruled that the record could not be sealed. As the petitioner, ST had the ability to withdraw her appeal at any time. However, ST wanted to withdraw her appeal *and* have everything that had happened in the case stricken from the record. This request was inconsistent with the court's ruling based on the *Ishikawa* factors.

We hold that the superior court did not err in denying ST's request to withdraw her appeal and strike everything from the record.

#### C. RIGHT TO APPOINTED COUNSEL

ST argues that the superior court erred by not providing her with appointed counsel as an indigent litigant. She argues that she was entitled to counsel because her constitutional rights were at stake and that failure to provide counsel was a violation of her Fifth Amendment right against self-incrimination. We disagree.

Generally, there is a right to counsel in civil cases only when a civil litigant's "physical liberty is threatened" or a "fundamental liberty interest . . . is at risk." *In re Dependency of Grove*, 127 Wn.2d 221, 237, 897 P.2d 1252 (1995).

Here, ST argues she had a right to counsel because her civil rights were being restricted and her constitutional rights were being violated. But ST's superior court case involved an appeal from an ALJ's ruling affirming DVR's closure of ST's claim for vocational rehabilitation services. The closure of a claim for benefits does not involve a fundamental liberty interest. And as discussed above, the closure did not implicate any constitutional rights.

ST also argues that the failure to appoint counsel violated her Fifth Amendment right against self-incrimination. But ST does not explain how she was forced to testify against herself in a criminal case or how her statements could be used against her in a criminal case. Her only statement in support of this claim is that the superior court asked her questions. In the absence of meaningful argument on this claim, we decline to consider it. RAP 10.3(a)(6); *Norcon Builders*, 161 Wn. App. at 486.

Therefore, we hold that the superior court did not err in denying ST's request for appointed counsel.

D. REQUEST FOR COMPENSATION

ST requests that we order DVR to pay her cash compensation for her time and court costs plus an additional \$10,000 to help start her business. When reviewing an appeal of an agency action, we can award damages only if expressly authorized by another provision of law. RCW 34.05.574(3). ST does not identify any authority that she can recover compensation in an appeal of an agency action even if she did prevail on the merits. Therefore, we reject her request.

E. ADDITIONAL CLAIMS

1. Opportunity to Present Case

ST argues that the superior court did not give her an opportunity to present her case and did not give her a fair hearing for various reasons. But the record does not support ST's claim.

## 2. Constitutionality of Mental Health Laws

ST challenges the constitutionality of all state and federal laws involving mental health or mental illness. We decline to consider this argument.

In order to bring a constitutional challenge, a plaintiff must ordinarily demonstrate that he or she has been directly affected by the challenged statute. *Fed. Way Sch. Dist. No. 210 v. State*, 167 Wn.2d 514, 528, 219 P.3d 941 (2009). The party challenging the government action must also show that the action operated to their prejudice. *Muma v. Muma*, 115 Wn. App. 1, 6, 60 P.3d 592 (2002). Litigants do not generally have standing to challenge government actions on behalf of a third party's constitutional rights. *Ludwig v. Dep't of Ret. Sys.*, 131 Wn. App. 379, 385, 127 P.3d 781 (2006).

Here, ST challenges mental health laws in general. However, ST does not claim that these laws have affected her personally and has not shown that she has been prejudiced by the government actions she challenges. Therefore, we hold that ST does not have standing to challenge the constitutionality of these laws and decline to address her arguments.

## 3. Deficiencies of the Mental Health System

ST criticizes the mental health system as a whole, claiming among other things that the mental health industry infringes on constitutional rights and discriminates against women. However, ST does not explain how these comments are material to this case. We decline to address these arguments.

## 4. Admissibility of Mental Health Testimony

ST argues that psychiatry is not a scientific profession and therefore that the testimony of mental health professionals is not legally valid evidence. However, ST does not explain how this argument is material to this case. We decline to address this argument.

F. REQUEST TO SEAL APPELLATE RECORD

ST requests in an addendum to her opening brief that we permanently seal the appellate court records for this case, and that the court replace her name with initials in any opinion.<sup>3</sup> DVR does not appear to object to replacing ST's name with her initials in the opinion, but argues that redaction is a less restrictive alternative than sealing to protect ST's interests.

ST filed a motion in the Supreme Court to seal the appellate record and replace her name with initials. When the Supreme Court transferred the case to this court it directed the court to consider ST's motion to replace her name with initials. Our court commissioner ruled that ST had satisfied the *Ishikawa* factors and temporarily sealed the case while this appeal was pending. The commissioner also directed the parties to file amended briefs replacing ST's name with her initials.

We rule that ST's initials will be used in the opinion based on the commissioner's analysis of the *Ishikawa* factors.

Regarding sealing the appellate file, we refer this matter to the commissioner to decide whether to permanently seal the appellate record or to remove the seal and instead to redact identifying information.

CONCLUSION

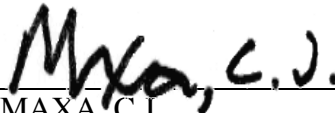
We affirm the ALJ's ruling and the superior court's order affirming that ruling, affirm the superior court's order denying ST's motion to seal the court record, and reject ST's other arguments. We refer this matter to the commissioner to decide whether to permanently seal the appellate record or to remove the seal and instead to redact identifying information.

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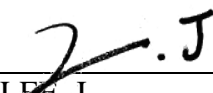
<sup>3</sup> The addendum also addresses sealing the superior court record, but we ruled above that the superior court did not err in denying her motion to seal the entire superior court record.




A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

  
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MAXA, C.J.

We concur:

  
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LEE, J.

  
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MELNICK, J.